United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-7081

United States Court of Appeals

For the Second Circuit.

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Appellants,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

On Appeal from an Order of the United States District Court for the Eastern District of New York

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Appellants' Brief

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UNITED STATES COURT OF APPEALS
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APPELLANTS' BRIEF

Statement of the Issues

1. Whether it was error for the District Court to dismiss the complaint for lack of subject matter jurisdiction, where the Department of State had failed to inform the Appellants of the basis for the denial of an immigrant visa to the husband of a United States citizen, in direct contravention of regulations requiring the disclosure of reasons for refusal to issue a visa.

2. Whether the State Department erred in holding that "association with organized criminal society" in an alien's country of birth, even if such could be demonstrated, provides a basis upon which an alien can be denied an

immigration visa under Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(27).

3. If "association with organized criminal society" in a alien's country of birth can be a basis upon which to deny an immigrant visa, can a United States citizen wife be denied the consortium of her spouse in the United States, without being given sufficient factual justification for the denial and an opportunity to refute the adverse information.

Statement of the Case

This is an appeal from a decision of the Hon. Walter Bruchhausen, United States District Judge for the Eastern District of New York, entered on January 20, 1975. That decision granted the Government's motion to dismiss the complaint for lack of jurisdiction over the subject matter (15a-22a).[1]

The Appellants commenced this action on June 4, 1974, by the filing of a complaint seeking declaratory and injunctive relief (3a-6a). The Appellants sought review of the decision of the Department of State in arbitrarily refusing to issue an immigrant visa to Vincenzo Burrafato, the husband of a United States citizen, without stating any reasons for this refusal and additionally, sought an order staying his deportation and granting him a permanent resident visa.

On October 3, 1974, the Government moved to dismiss the complaint (7a), and on January 20, 1975, Judge Bruchhausen entered an order granting that motion on the ground that the Court lacked jurisdiction over the subject

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1. References followed by the letter "a" refer to pages in the Joint Appendix.

matter. The Appellants thereafter filed an appeal to this Court (23a) and brought on an order to show cause for a stay of all further proceedings pending the determination of this appeal (24a-34a). On January 28, 1975, Judge Bruchhausen granted the Appellants' application and entered an order staying the Immigration and Naturalization Service from deporting Vincenzo Burrafato as well as restraining the Service from withdrawing the privilege of voluntary departure, pending the decision on this appeal (36a, 37a).

Statement of the Facts

The Appellant, Vincenzo Burrafato (hereinafter, "Burrafato"), is an alien, a native and citizen of Italy. In 1961, he was married in Italy to the Appellant, Antonina Burrafato, a citizen of the United States (33a). Appellants are the parents of two children born in Italy both of whom are now lawful permanent residents of the United States. The first son, Franco, was born on July 18, 1962 and the second child, Giuseppe, was born on February 20, 1965 (33a).

Based on his status as the spouse of a United States citizen, a status approved by the Immigration and Naturalization Service, Burrafato applied at the American Consulate in Palermo, Italy, on or about February 1970, for an immigrant visa to enter this country. While this application was still pending, Burrafato's wife and children returned to the United States in January, 1971. Subsequently, Burrafato learned that the visa application was denied by the United States consul at Palermo but he was not informed of the basis of this denial. On or about October 21, 1971, in response to prior counsel's appeal for reconsideration of the visa denial, the Visa Office of the

Department of State informed the Appellants by letter that upon review, "no facts were disclosed which would warrant a reversal of the original finding of ineligibility *under Section 212(a) of the Immigration and Nationality Act*" (emphasis added). There are thirty-one subdivisions of Section 212(a), ranging from mental and physical conditions through conviction for crime, narcotics involvement, previous deportation and many other reasons. As a result of the unbearable separation from his family, Burrafato left Italy and entered the United States in September, 1971 (34a).

Thereafter, on or about December 7, 1972, the Immigration and Naturalization Service issued an order to show cause charging Burrafato with entering the United States without a valid immigrant visa or other entry documents (20a). A deportation hearing was held in that matter and Burrafato conceded the truth of the allegations contained in the order to show cause. In accordance with this concession, the Immigration Judge entered an order on July 25, 1974, finding Burrafato deportable, but granting him the privilege of voluntary departure in lieu of deportation (22a). The Immigration Judge also ruled that he had no jurisdiction to consider complaints against the actions of an American consul or the Visa Office of the Department of State.

At no time has the State Department ever disclosed the reason for the visa denial, not even to date. However, in the Government's affidavit in support of its motion, it was stated that the cause of the denial was "association with organized criminal society" (in Italy). This basis was claimed to bring Burrafato within Section 212(a)(27) of the Act, 8 U.S.C. §1182(a)(27).

Relevant Statute

Immigration & Nationality Act, 66 Stat. 163 (1952), as amended:

Section 212, 8 U.S.C., Section 1182—

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; . . .

Relevant Regulation

Title 22, Code of Federal Regulations (C.F.R.)—

Section 42.130 Procedure in refusing visas.—

(a) *Refusal Procedure* . . . When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department which shall be signed and dated by the consular officer. The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available. If the grounds of ineligibility may be overcome by the presentation of additional evidence and if the applicant in-

dicates that he intends to submit such evidence, the original of Form FS-510 and the documents attached thereto may in the discretion of the consular officer and with the consent of the applicant be retained in the consular files for a period not exceeding 120 days after which time the original Form FS-510 and supporting documents shall be forwarded to the applicant if the refusal has not in the meantime been overcome. . . .

(b) *Review of Refusals at Consular Offices.* If the grounds of ineligibility may be overcome by the presentation of additional evidence, and if the applicant has indicated that he intends to obtain such evidence, a review of the refusal may be deferred for a period not to exceed 120 days. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for the case himself.

(c) *Review of refusals by the Department.* The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. *Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the*

facts, shall be binding upon consular officers. (emphasis added)

(d) *Reconsideration of refusal.* If a visa is refused, and the applicant within 120 days from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, his case shall be reconsidered without the requirement of the payment of an additional application fee.

ARGUMENT

Point I

The District Court Erred in Holding that it had no Jurisdiction to Review a Decision of the Department of State to Deny a Visa, Where the Denial is Based on a Error of Law.

The single ground upon which the Court below granted the Government's motion to dismiss the complaint was because the District Court determined that it lacked jurisdiction over the subject matter (15a, 16a, 19a). It is the position of the Appellants herein that the Court below committed error in reaching this determination.

The basis of the Government's motion to dismiss the complaint was founded upon the premise that courts are without jurisdiction to review a determination of an American consul to deny a visa. Although Appellants believe that the concept of consular unreviewability has been substantially eroded by recent developments, we recognize that Courts have frequently held factual determinations by a consulate to be exempt from judicial scrutiny. *United States ex rel. Knauff v. Shaughnessy,* 338

U.S. 537, 542-543 (1950); *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2nd Cir. 1927), *cert. denied*, 276 U.S. 630 (1928); *Loza-Bedoya v. Immigration & Naturalization Service*, 410 F.2d 343 (9th Cir. 1969); *Licea-Gomez v. Pilliod*, 193 F. Supp. 577 (N.D. Ill. 1960). However, this Court need not reach that issue because the Appellants herein are not seeking review of consular action, rather, we are seeking review of a ruling of law by the Department of State to deny the visa which ruling is controlling on the consul under 22 C.F.R. §42.130(c). Moreover, the Supreme Court has already determined that such decisions are subject to judicial review. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). See also: *MacDonald v. Kleindienst*, unreported, (S.D.N.Y., October 20, 1972).[2]

In *Kleindienst v. Mandel, supra*, the alien, Ernest Mandel, was denied a visa by the consul on the ground that he was ineligible for admission to the United States under Section 212(a)(28) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1182(a)(28).[3] The discretionary waiver of this ground of exclusion for non-immigrants as provided under Section 212(d)(3)(A) of the Act, 8 U.S.C. §1182(d)(3)(A), was also denied and Mandel and six United States citizens brought suit to review the denial of his visa. The plaintiffs alleged that the denial of the visa violated their First Amendment rights to hear and speak with Mandel. The Supreme Court, in reaching the merits of that claim, reviewed the decision of the Attorney General and the Department of State, to see whether the denial of

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2. Because of the significance of this decision upon the merits of the present case, we have set forth the full opinion of the three judge Court in the Joint Appendix for the convenience of this Court (38a-43a).

3. That section makes aliens who advocate, *inter alia*, anarchism or the violent overthrow of the United States Government ineligible from admission to this country.

the waiver, and hence the denial of the visa, was supported by "a facially legitimate and bona fide reason" (408 U.S. at p. 770). Thus, reliance by the Court below upon *Mandel* to support its finding of lack of jurisdiction is totally misplaced, since the Court there held it had jurisdiction to examine the merits of the visa denial.

In *MacDonald v. Kleindienst, supra,* a similar action was brought in the Southern District of New York, seeking review of the decision to deny visas to four Cuban film makers. The only basis asserted by the Government to support its denial therein was the claim that the aliens were ineligible to receive visas under Section 212(a)(28) of the Act, 8 U.S.C. §1182(a)(28). There, the Court remanded the matter to the Department of State with instructions to set forth its reasons for the denial in accordance with the Supreme Court's holding in *Mandel* (38a-43a). Thus, the Appellants contend that the decision of the Court below is directly contrary to the holding of the three judge court in *MacDonald v. Kleindienst, supra.*

Additionally, reliance by the District Court on the recent decision in *Noel v. Chapman,* 508 F.2d 1023 (2nd Cir. 1975), is equally misplaced. There the Court affirmed the decision of the Court below *on the merits* and held that the Immigration and Naturalization Service policy of no longer granting indefinite voluntary departure to a certain class of aliens was not constitutionally defective, and that the denial of relief to the plaintiffs therein did not constitute an abuse of discretion.

In short, this suit is not one to review a consular determination made by an American official abroad. It is rather an action to review a decision of the Department of State in affirming a consular determination. That determination consisted of three rulings of law which were

appealed to and affirmed by the Visa Office of the Department of State in Washington—and under 22 C.F.R. §42.130(c), it is the Visa Office ruling of law which is *binding* on the consulate. These rulings were: (a) it is not necessary to tell an alien which one of 31 different subdivisions of Section 212(a) is the basis for his not getting a visa; (b) subdivision (27) is not limited to political subversives but applies equal to persons believed to be "associated with organized criminal society"; and (c) it is not necessary to elucidate to a person seeking an immigration visa, even the husband of a United States citizen, the slightest basis for the belief that he is "associated with organized criminal society", despite the fact that 22 C.F.R. §42.130(a) and (b) afford him the right to attempt to overcome the ground of ineligibility.

If the Visa Office can make any ruling it wants, and those rulings are shielded from judicial review, it becomes an *imperium*, an absolute sovereign capable of making its *own* laws—for only by the power of judicial review can an agency's decisions be required to conform to the laws of Congress, and to the Constitution. To deny the existence of jurisdiction in the Court to even *consider* whether the Visa Office is in violation of its own regulations, or of the statute, is to give carte blanche to unrestricted agency lawmaking.

The Appellants strongly urge this Court that a finding of jurisdiction is essential to avoid granting unlimited immunity from judicial examination of arbitrary decisions made by a consular or State Department official in violation of law or regulations. A rejection of jurisdiction by the Courts leaves officials of the Department of State, unlike officials of any other agency, free to violate the law with impunity. As the Court in *Golobek v. Regional Manpower Administration, United States Department of*

Labor, 329 F.Supp. 892 (E.D.Pa. 1971) stated in finding jurisdiction to review the denial of a labor certification:

> "The court's initial finding must be whether it has jurisdiction to review a determination relegated to the Secretary of Labor. . . . Previous cases have not squarely decided this problem. However, several have held that there is a general tendency to favor judicial review of administrative action which is especially powerful in immigration and naturalization cases. *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961), involved the excluding of an alien who was in possession of a visa. The court stated that the effect of the Administrative Procedure Act and the Immigration Act was to make available judicial review of agency action relating to immigration. It then found that a court of law was the proper place to test unauthorized administrative power. (329 F.Supp. at 894)"

The Court went on to state:

> "An administrative decision based upon erroneous legal standards cannot stand: *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943). A denial of any review would leave petitioner helpless and subject to deportation despite the possible merits of the underlying case. (329 F.Supp. at 894)

Moreover, in granting the Government's motion to dismiss the complaint, the Court below failed to consider any of the jurisdictional grounds alleged by the Appellants. We now proceed to discuss each of the Appellants' claims upon which this Court has jurisdiction to decide this matter.

5 U.S.C., Sections 701-706

The Administrative Procedure Act, 5 U.S.C. §§701-706 confers power upon the District Court to review agency action. Specifically, 5 U.S.C. §702 provides that a "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof". Initially, the threshold consideration to be resolved is whether the Administrative Procedure Act confers an independent grant of jurisdiction. Some of the circuit courts that have considered the issue and support the Appellants' contention include *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 497 (1st Cir. 1974); *Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Deering Milliken, Inc. v. Johnson*, 295 F.2d 856 (4th Cir. 1961); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967), *cert. denied*, 389 U.S. 975.

With regard to decisions of this Circuit, the issue appears to remain open. *Aguayo v. Richardson*, 473 F.2d 1090, 1102 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). But cf: *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2nd Cir. 1970), *cert. denied sub nom., Parker v. Citizens Committee*, 400 U.S. 949 (1970). In *Citizens Committee for Hudson Valley, supra*, the district court considered a challenge to the decision of the Secretary of the Army to issue a permit for construction of a proposed highway. The Secretary and other federal defendants contested jurisdiction, but Judge Murphy specifically held that the APA "justifies this Court's jurisdiction." 302 F.Supp. 1083, 1090 (S.D.N.Y. 1969). In so doing, Judge Murphy surveyed decisions of the Court of Appeals as of that date, which he found to be in "apparent conflict" (*id* at 1091), as well as the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136

(1967), in which the Supreme Court, according to Judge Murphy, "implemented what appears to be a presumption in favor of a finding of jurisdiction under the Administrative Procedure Act." *Ibid.* Concluding that "the presumption in favor of jurisdiction has not been rebutted by a clear and convincing presentation of an opposite legislative intent," the district court held that it had jurisdiction under the APA to decide the dispute. *Ibid.*

On appeal, the Court of Appeals noted that subject matter jurisdiction was one of the "threshold questions" (425 F.2d at 101), and began its discussion with a specific recognition that the district court's decision "rested its jurisdiction on the Administrative Procedure Act." *Ibid.* The Court held that

> "Since the Army's issuance of this permit was final agency action for which there is no other adequate remedy in a court, and review is not clearly and convincingly precluded by the Rivers and Harbors Act, the Administrative Procedure Act must be read to confer equitable jurisdiction on the district court to protect by injunctive relief such rights as the plaintiff may have standing to assert . . . if the Administrative Procedure Act could not serve as a basis for jurisdiction, the important goal of subjecting final agency action to judicial scrutiny would be frustrated. We therefore conclude that the district court properly assumed jurisdiction." (425 F.2d at 102).

Although the Supreme Court has not finally resolved this issue, the decisions of that Court would appear to support the Appellants' position. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Abbott Laboratories v. Gardner, supra.* Thus, Appellants urge

that the more reasonable view would be the position taken by the majority of circuits that have considered this question and the view expressed by this Circuit in *Citizens Committee for Hudson Valley, supra.*

28 U.S.C., Section 1361

The federal mandamus statute gives the district court jurisdiction to compel an officer or employee of the United States to perform a duty owed to him. This remedy is available to direct the performance of a ministerial duty, where the claim is clear and certain and the actions plainly defined. *Guffanti v. Hershey,* 296 F. Supp. 553, 555 (S.D.N.Y. 1969); *Spatola v. U.S. Department of Defense,* 352 F.Supp. 778 (S.D.N.Y. 1972).

The nature of the mandamus statute is therefore intended to compel performance in accordance with appropriate statutes or regulations and is not designed to influence the exercise of discretion. *Leonhardt v. Mitchell,* 473 F.2d 709, 713 (2nd Cir. 1973), *cert. denied,* 412 U.S. 949 (1973); *Lyons v. Weinberger,* 376 F.Supp. 248, 255 (S.D.N.Y. 1974). In the present case, the regulations of the Department of State embodied in 22 C.F.R. §42.130, require it to set forth the reasons for denying a visa and allow the aggrieved party an opportunity to rebut the adverse information. However, in this case the Department of State failed to adhere to these regulations and failed to divulge the reasons for the denial. Additionally, without providing the factual basis for its determiation, Appellants were effectively prevented from exercising their rights under the State Department regulations to respond to or rebut the derogatory information. Consequently, under 28 U.S.C. §1361, the matter should be remanded to the

Department of State to issue the visa or to set forth proper justification for its denial and then to provide the Appellants with an opportunity to rebut any adverse information.

8 U.S.C., Section 1329

Section 279 of the Act, 8 U.S.C. §1329 confers jurisdiction upon district courts of "all causes, civil and criminal, arising under any of the provisions of this subchapter [referring to subchapter II, dealing with visas and visa issuance]." It has been held that this statute confers an independent grant of jurisdiction to district courts. *Buckley v. Gibney*, 332 F.Supp. 790, 794 (S.D.N.Y. 1971), *affirmed*, 449 F.2d 1305 (2nd Cir. 1971), *cert. denied*, 405 U.S. 919; *Hom Sin v. Esperdy*, 239 F.Supp. 903 (S.D.N.Y. 1965).

Under the facts of the present case, the denial of the visa was allegedly made under one of the exclusionary grounds contained in Section 212(a) of the Act, 8 U.S.C. §1182(a). As that denial arose under one of the provisions of subchapter II of Title 8, the District Court has jurisdiction to examine the basis for the denial.

28 U.S.C., Section 1331(a)

Another jurisdictional statute which Appellants can rely upon, although not specifically mentioned in the complaint, is 28 U.S.C. §1331(a). This general federal jurisdictional statute provides District Court jurisdiction for any case which "arises under the Constitution . . . of the United States" and in which "the matter in controversy exceeds the sum of $10,000." Jurisdiction under 28 U.S.C. §1331 can be defeated only if it can be shown to a "legal certainty" that the value of the matter in controversy is less

than the statutory minimum. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938); *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973). Additionally, in an action for injunctive relief, the jurisdictional amount requirement is satisfied if "the value of the right being protected or the injury being averted" exceeds $10,000. *Kheel v. Port of New York Authority*, 457 F.2d 46, 49 (2nd Cir. 1972), *cert. denied*, 409 U.S. 983; *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 181 (1936); Wright, *Law of Federal Courts* (2d Ed. 1970), Sec. 33, p. 116.

In attempting to satisfy this monetary limitation, some courts have taken a more liberal view when seeking to place a value on intangible personal rights. *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971); *Fein v. Selective Service System*, 430 F.2d 376 (2nd Cir. 1969). Thus, Appellants contend that to deny him a visa without affording him due process of law under the Fifth Amendment, by informing him of the evidence against him and by providing him with an opportunity to rebut it, together with the drastic consequences of separation from his family, creates a controversy incapable of exact monetary dimensions and certainly well in excess of the $10,000 limitation.

Therefore, for the reasons set forth, Appellants contend that the decision of the Court below to dismiss the complaint for lack of subject matter jurisdiction is erroneous as a matter of law and must be reversed.

POINT II

The Department of State Violated its own Regulations in Refusing to Specify a Reason for Denying an Immigration Visa to the Husband of a United States Citizen and Should be Ordered to Issue the Visa or to Furnish Reasons Which Support its Refusal.

The original basis disclosed by the Department of State in denying Burrafato's application for a visa was set forth in the Department's letter of October 21, 1971 (35a). The letter claimed that the visa was denied under Section 212(a) of the Act, 8 U.S.C. §1182(a). However, that section contains the general classes of aliens ineligible to receive a visa and excludable from admission to the United States. That section is broken down into thirty-one subdivisions, including by way of illustrating the variety of causes, aliens who are mentally retarded (subdivision 1), insane (subdivision 2), sexual deviates (subdivision 4), drug addicts (subdivision 5), criminals (subdivision 9 and 10), narcotic dealers (subdivision 23), Communists (subdivision 28), etc. It was not until some three years later that the Government in its affidavit in support of the motion to dismiss, chose to further refine the denial and limit the ground to Section 212(a)(27) of the Act, 8 U.S.C. §1182(a)(27). (9a).

The Appellants contend that the denial of the visa originally made without specifying any reasons and still unsupported by any factual justification, is contrary to law and to the regulations promulgated by the Department of State 22 C.F.R. §42.130. In *Kleindienst v. Mandel, supra,* the Supreme Court enunciated the test in reviewing visa denials where a constitutional right was invoked and where the alien was outside the territorial boundaries of the

United States, as follows:

> "In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under Sec. 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively *on the basis of a facially legitimate and bona fide reason* (emphasis added), the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. (484 U.S. at p. 770)".[4]

Clearly, this decision mandates that the State Department give at least a facially legitimate reason to support the denial—which surely has not been done in this case.

In *MacDonald v. Kleindienst, supra,* the three judge Court determined that the denial of visas to four Cuban individuals on the ground that they were ineligible to receive visas under Section 212(a)(28) of the Act, 8 U.S.C. §1182(a)(28) was insufficient to constitute "a facially legitimate and bona fide reason". The Court also rejected the idea that the State Department has absolute discretion to deny a visa and concluded that the matter should be

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4. Appellants also contend that the scope of review by this Court is the "arbitrary, capricious or abuse of discretion" standard generally used to review agency action. *Citizens to Preserve Overton Park v. Volpe, supra; Wong Wing Hang v. Immigration and Naturalization Service,* 360 F.2d 715 (2nd Cir. 1966). Moreover, this standard would also apply if a similar application for adjustment of status to that of a permanent resident were made to an Immigration Judge during a deportation hearing. *Chen v. Foley,* 385 F.2d 929 (6th Cir. 1967), *cert. denied,* 393 U.S. 838, *Foti v. Immigration and Naturalization Service,* 434 F.2d 602 (1st Cir. 1970).

remanded to the Department of State for the purpose of setting forth proper justification for its refusal to issue the visa (42a, 43a).

Moreover, the regulations promulgated by the Department of State in 22 C.F.R. § 42.130 govern the procedures to be followed in denying a visa. Of course, it is undisputed that these regulations have the force and effect of law. *Boske v. Comingore*, 177 U.S. 459 (1900); *California Commission v. United States*, 355 U.S. 534, 542-543 (1958). Pursuant to 22 C.F.R.§42.130(a), an individual whose request for a visa has been denied, is entitled to be "informed of the provision of law, or regulation issued thereunder, on which the refusal is based". As previously stated, Burrafato was not informed of the particular basis for the denial until more than three years after his visa was denied (8a, 9a).

Furthermore, the clear intent of the regulations envisions disclosure of the adverse information in order that the applicant for the visa may present additional evidence to overcome the denial. If the applicant is not provided with the particular information which he must rebut, then the regulation allowing such an opportunity would be meaningless. Additionally, the statement in the Department's letter that "the grounds for refusal are of a confidential nature" (35a), if accepted, would also render the regulations meaningless since by statute, all records of the Department of State and of consular offices are confidential. Section 222(f) of the Act, 8 U.S.C.§1203(f). Moreover, this identical argument was made in *MacDonald v. Kleindienst, supra*, and was soudnly rejected by that Court.

Finally, *assuming arguendo*, that those associated with "organized criminal society" can be denied admission to the United States on the ground alleged by the Government

(See Point III), Burrafato has submitted an affidavit wherein he unequivocally denies ever being a member of a criminal organization (33a, 34a). Moreover, he has never been convicted of any crime and has not been in trouble with the police while residing in the United States. Consequently, to expell him from this country and separate him from his United States citizen wife and his two children, without allowing him the opportunity to know the derogatory information against him, and without allowing him the chance to refute this information, in direct contravention of the regulations, would constitute expulsion from this country without due process of law under the Fifth Amendment. *Galvan v. Press*, 347 U.S. 522, 530-531 (1954); *Chew v. Colding*, 344 U.S. 590 (1953).

POINT III

If the Reason for the Denial of the Visa was "Association with Organized Criminal Society" in Italy, that Reason would not, As a Matter of Law, Constitute a Ground of Exclusion Within the Meaning of Section 212(a)(27) of the Act,

Although the original denial letter from the Department of State only referred to the general exclusion statute, Section 212(a) of the Act, 8 U.S.C. §1182(a), (See 35a), the Government in its affidavit in support of the motion to dismiss the complaint, characterized the ground for the denial as:

> ". . . pursuant to Section 212(a)(27) [association with organized criminal society] of the Immigration and Nationality Act . . . (9a)

The Government's affidavit further stated that the basis of this belief was the files and records of the Immigration and

Naturalization Service and the Department of State (9a).

The Appellants argue that it is a manifest and flagrant violation of law for the Department of State to rule that "association with organized criminal society" constitutes a ground of exclusion which Congress intended to include within the purview of Section 212(a)(27) of the Act, 8 U.S.C.§1182(a)(27).

Section 212(a)(27) provides:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[5]

The legislative history of this subsection is reflected in the *U S. Code Cong. & Admin. News*, Vol. 2, p. 1703 (1952), as follows:

> "Paragraphs (27), (28) and (29) of Section 212(a) incorporate the provisions of Section 1 of the Act of October 16, 1918, as amended by Section 22 of the Subversive Activities Control Act of 1950, relating to the *exclusion of subversives.*" (emphasis added)

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5. The Immigration and Nationality Act does not provide a waiver for prospective immigrants excludable under Section 212(a)(27), 8 U.S.C. §1182(a)(27), regardless of their ties in the United States or the extreme hardship that may result.

The Act of 1918 applied to aliens who advocated or were members or affiliates of organizations which advocated violent overthrow of the United States Government, 1 Gordon & Rosenfield, *Immigration Law and Procedure*, Sec. 2.47, p. 2-222.

The subversive Activites Control Act of 1950, 50 U.S.C., Section 781, et seq., pertains strictly to the control of Communists. In *Kleindienst v. Mandel, supra*, the Supreme Court made the following statement which further clarifies such purpose:

> "In the years that followed, after extensive investigation and numerous reports by Congressional Committee . . . , Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration & Nationality Act of 1952."

The Court went on to state:

> "We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with Communist affiliation or views."

(408 U.S. at 761).

What emerges from an analysis of the legislative history of Section 212(a)(27), is that Congress was concerned entirely with the exclusion of *political* subversives. There is

not a single sentence contained anywhere in the legislative history tending to indicate that Congress, in drafting Section 212(a)(27) was seeking to exclude those engaging in ordinary criminal conduct, or those associating with people engaging in such conduct.

We submit that the proper approach to determine the scope of a provision contained in Section 212(a) was that taken by the Supreme Court in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967). *Boutilier* involved a determination, within the context of a deportation proceeding, of whether or not the statutory words, "afflicted with a psychopathic personality" contained in Section 212(a)(4) of the Act, 8 U.S.C.§1182(a)(4), applied to an alien who was admittedly a homosexual. In determining that the alien's behavior *did* fall within Section 212(a)(4), the Court made an exhaustive analysis of the legislative history of that provision in order to determine the Congressional intent. The Court's conclusion was, therefore, based squarely on the various statutes, bills, and committee reports cited in the opinion. (387 U.S. at 120-123).

In the present case, a similar analysis of the legislative history of Section 212(a)(27) demonstrates that the conduct of which the alien has been accused, clearly does *not* come within the Congressionally intended ambit of the provision in question. For the reasons previously indicated, there is no question that Congress was concerned exclusively with threats to the national interest derived from political subversive activities. Accordingly, the State Department's ruling, including "association with organized criminal society" within the provisions of Section 212(a)(27) was contrary to the intent of that section, and an error of law.

Furthermore, the conclusion that "association with organized criminal society" was not included in Section

212(a)(27) is also demonstrated by the fact that Congress has provided for exclusion of those involved with criminality in *other* subdivisions of Section 212(a). [Sections 212(a) (9), (10) and (23), 8 U.S.C. §1182(a)(9), (10) and (23).] Additionally, except in cases involving narcotic traffickers, which is subdivision (23) the statute requires either actual *convictions*, or an *admission* on the part of the alien of the commission of acts amounting to a crime involving moral turpitude [Sections 212(a) (9) and (10)]. However, even where these elements of excludability are present, Congress has provided for waivers of these grounds of inadmissibility for the spouse or children of United States citizens seeking to immigrate to the United States. Section 212(h) of the Act, 8 U.S.C. §1182(h).

The State Department's interpretation applying the non-waivable provisions of subdivision (27) to persons "associated with organized criminal society", would place a person *suspected* of a crime in a worse legal position than a *convicted* criminal—a totally absurd result. We submit that the legislative pattern which emerges from the statute indicates a strong desire on the part of Congress to protect the United States from those who would subvert the political process—regardless of the hardship or possible unfair effect upon particular individuals—while the attitude with respect to those involved with ordinary criminality is much more humane and in accord with traditional notions of due process of law. Clearly the concept of "guilt by association" which the State Department has imposed upon Burrafato for his alleged criminal connection, is totally inappropriate in light of the legislative scheme to bar only convicted or admitted criminals.

We also urge that, even assuming *arguendo*, that Section 212(a) (27) is intended to exclude those whose criminal

activities would endanger the welfare of the United States, a mere finding of *association* with organized criminal society should not be sufficient to bring a visa applicant within the purview of the statute. "Association" can, of course, take many forms ranging from a casual or social relationship to involvement, as a principal, in a criminal conspiracy or membership in a criminal organization. We submit that if Section 212(a)(27) is used by the State Department to exclude a visa applicant, it should be invoked *only* upon a finding that such individual is seeking to enter the United States to engage in unlawful activities, and not because the people with whom he has associated are believed to be criminals.

Although 22 C.F.R. §§ 42.130(a) and (b) permit the alien to offer evidence in refutation of a ground of visa ineligibility, it is clear that the alien cannot offer evidence in a vacuum. The original cruel error of the State Department was, that for over 3 years, it would not even identify which of the thirty-one subdivisions of ineligibility was at issue. This made the right of refutation a total farce.

Now, the Government says that "associated with organized criminal society" is the bar. Assuming the Visa Office eventually agrees to disclose that this is the problem, does not the right of refutation under the regulation and does not procedural due process of law under the Fifth Amendment, require that before the American wife can be deprived of her husband, a *showing* of such "association" be made? Subdivision (27) bars aliens

> "who the consular officer knows *or has reason to believe* seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States".

Burrafato had never been convicted of any crime while he lived in Italy. He submitted to the District Court a lengthy affidavit of his life's activities which is uncontroverted. Under these circumstances, the failure of the government to show a scintilla of support for the alleged belief that he was "associated with organized criminal society" leads to the dreadful suspicion that the Consul and the State Department acted without evidence of any kind and by its battle on jurisdiction, might be seeking to cover up its ghastly blunder.

To support the government's position now would be to rewrite Section 212(a) by adding a new subdivision (that Congress surely never wrote and never will), to wit:

> "Any alien who, in the personal and unfettered judgment of a consular officer, cannot be shown to be in any of the foregoing 31 subdivisions, but is believed by such officer not to be a desirable person to have in the United States".

It is a sad thing that some officials still act as if secrecy is the right of government; and when secrecy is used to deny the husband of a United States citizen the right to join his wife and children, it becomes terribly suspect as a mere device to conceal the sheer arbitrainess of an official's decision.

CONCLUSION

The decision of the District Court must be reversed and the matter remanded with instructions to issue the visa or to provide a sufficient justification to support the visa denial.

Respectfully submitted,

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STATE OF NEW YORK)
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COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of March, 1975 deponent served the within Brief upon U. S. Attorney Eastern Dist.

attonrye(s) for Appellee

in this action, at 225 Cadman Plaza East Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
27 day of March, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976